

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE: SANTA FE NATURAL
TOBACCO COMPANY MARKETING
AND SALES PRACTICES LITIGATION

NO. 16-MD-2695 JB/LF

Transcript of Proceedings before The Honorable
James O. Browning, United States District Judge,
Albuquerque, Bernalillo County, New Mexico,
commencing on December 12, 2018.

For the Plaintiffs: Mr. Nicholas Koluncich

For the Plaintiffs Via Telephone: Ms. Melissa Weiner; Mr. Scott Schlesinger; Ms. Kathy Love; Mr. Jeffrey Haberman; Ms. Erika Anderson; Mr. Steve Teppler; Ms. Kas Gallucci

For the Defendants Via Telephone: Mr. David Monde; Mr. Andrew Schultz; Mr. Peter Biersteker

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1 THE COURT: All right. Good afternoon
2 everyone. The Court will call In Re: Santa Fe
3 Natural Tobacco Company Marketing and Sales Practices
4 and Products Liability litigation, MD-16-2695 JB/LF.
5 Let's take counsel -- I'll start with Mr. Koluncich
6 here in the courtroom, if you want to enter an
7 appearance.

8 MR. KOLUNCICH: Good afternoon, Your Honor,
9 counsel. Nicholas Koluncich on behalf of plaintiffs.

10 THE COURT: Mr. Koluncich, good afternoon
11 to you. And who on the phone is here for the
12 plaintiffs?

13 MS. WEINER: Good afternoon, Your Honor,
14 Melissa Weiner on behalf of the plaintiffs.

15 THE COURT: You'll have to say that once
16 again. You're a little hard to here.

17 MS. WEINER: Good afternoon, Your Honor,
18 Melissa Weiner on behalf of the plaintiffs.

19 THE COURT: Ms. Weiner, good afternoon to
20 you. Who else is on for the plaintiffs?

21 MS. LOVE: This is Kathy Love, local
22 counsel for plaintiffs.

23 THE COURT: Ms. Love, good afternoon to
24 you. Anyone else on the phone for the plaintiffs?

25 MS. SCHLESINGER: Scott Schlesinger, Your

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1 Honor.

2 THE COURT: Mr. Schlesinger, good afternoon
3 to you.

4 MS. SCHLESINGER: Good afternoon, sir.

5 THE COURT: Who else is on the phone for
6 the plaintiffs? Anyone else?

7 MR. HABERMAN: Yes, Your Honor. Good
8 afternoon. Jeffrey Haberman.

9 THE COURT: Okay. Mr. Haberman, good
10 afternoon to you. Anyone else for the plaintiffs?

11 MS. ANDERSON: Your Honor, Erika Anderson.

12 THE COURT: Say that one more time.

13 MS. ANDERSON: Erika Anderson on behalf of
14 the plaintiffs.

15 THE COURT: Ms. Anderson, good afternoon to
16 you.

17 Who else is there for the plaintiffs?

18 MR. TEPPLER: Yes, Your Honor, Steve
19 Teppler for the plaintiffs.

20 THE COURT: All right. Mr. Teppler, good
21 afternoon to you. Anyone else from the plaintiffs?

22 MS. GALLUCCI: Kas Gallucci on behalf of
23 the plaintiffs.

24 THE COURT: Say that one more time.

25 MS. GALLUCCI: Kas Gallucci.

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1 THE COURT: Ms. Gallucci, good afternoon to
2 you. Anybody else on the plaintiffs' side wants to
3 enter an appearance?

4 Okay. How about from the defendants? Who
5 is on the phone from the defendants?

6 MR. MONDE: Good afternoon, Judge. David
7 Monde on behalf of the defendants.

8 THE COURT: Mr. Monde, good afternoon to
9 you. Anyone else from the plaintiffs -- I mean, from
10 the defendants?

11 MR. BIERSTEKER: Yes, Your Honor. Peter
12 Biersteker.

13 THE COURT: Mr. Biersteker, good afternoon
14 to you. Anyone else from the defendants?

15 MR. SCHULTZ: Yes, sir, Judge. This is
16 Andrew Schultz for the defendants.

17 THE COURT: Mr. Schultz, good afternoon to
18 you.

19 Anyone else for the defendants? All right,
20 anybody else on the phone want to enter an
21 appearance?

22 All right. I have reviewed the report that
23 I got from the defendants. I also went back and
24 reviewed some of the materials that I had reviewed
25 and kept in the folder from the last time that we

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1 were together, which I think was November 28 I
2 believe. So I think we set this up -- I'm not sure
3 when we set today up, but we had I think three
4 alternative dates. And in any case, we're together
5 this afternoon. Maybe this is one of the alternative
6 dates, maybe this is the first alternative date. And
7 I guess to see where we're going to go on this, it
8 looks to me like the defendants have given us -- I'll
9 let the plaintiffs tell me if they agree. But it
10 looks to me like they have given me a report that is
11 in compliance with what I directed them to do with --
12 at least to me, it seemed to have the robustness that
13 I was hoping and expecting for.

14 So it seems to me we're probably in a
15 position where the plaintiffs need to make a decision
16 as to whether they just want to keep the schedule
17 that we have, or they want to slide the schedule and
18 get this discovery.

19 So let me -- since I've had the report of
20 the defendant, am I going to be hearing from you, Ms.
21 Weiner?

22 MS. WEINER: Yes, Your Honor.

23 THE COURT: All right. Ms. Weiner.

24 MS. WEINER: We obviously received the
25 report this afternoon. That was the first that we've

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1 understood the time compensated for the search and
2 production of the material responsive to the search
3 terms that the parties agreed upon last week.

4 And defense counsel is correct in its
5 representation to the Court that we did, in fact,
6 agree upon search terms.

7 There is a little bit more to the picture
8 that I would just like to highlight for the Court.
9 In drafting the search terms that we did, we spent a
10 lot of time in an effort to narrow the field to just
11 that information that pertains to the request for
12 production. And there are four of them, not just two
13 of them, as stated in the status report. I'm not
14 sure where the other two got left off. But there has
15 always been with reference to an email between
16 Mr. Schultz and Mr. Monde on four pricing RFPs.

17 We attempted to try to find search terms
18 that would only produce the material that pertains to
19 pricing information, and not this large universe of
20 documents that would require a significant amount of
21 sifting.

22 So in addition to trying to come up with
23 very discrete search terms, we also went back through
24 the documents that we already have in this case,
25 where we believe there are -- I've been calling them

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1 kind of series of documents, reports that were either
2 monthly or quarterly, or a spreadsheet that we
3 believe is part of a larger universe of like
4 documents. And we identified each of those
5 individual documents with Bates numbers, and in some
6 cases actual attachments, to defense counsel, to
7 attempt to limit this search to documents that we
8 know are missing from the production.

9 I sent a very comprehensive email on Friday
10 to Mr. Monde with some questions with regard to the
11 search techniques. We, of course, met with our
12 technical folks on how can we do this with the least
13 amount of time burden, so that we can, if we decide
14 to agree to extend the schedule, it would be as
15 absolutely limited as possible.

16 And to that end, I suggested many
17 predictive coding and analytic tactics that can be
18 used in order to expedite the review and production
19 process. I have not received a response to that
20 email that I sent on Friday, which identified all of
21 these specific questions and issues that I had
22 outstanding. And so that is a piece of this that we
23 are still hoping before Friday that we can get an
24 answer to, so that we are able to make a decision by
25 Friday with respect to extending the schedule in any

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1 way.

2 I'm sorry, one more item, Your Honor. I
3 sent Mr. Monde an email this afternoon. Of course,
4 we're still in the process of digesting the report
5 that was filed this afternoon, and have to get in
6 touch with our technical folks. Many of those
7 matters that are discussed in that status report with
8 respect to time, we, just from a very preliminary
9 standpoint, our technical side, the folks that we
10 have consulted with believe that that is probably
11 longer than it should take to review that amount of,
12 quote "hits," recognizing that there is some
13 variability there.

14 But one of the questions I had for
15 Mr. Monde that I have not received an answer to -- I
16 just sent the email a couple of hours ago, after I
17 received the report -- is whether the, quote, "hits"
18 that came about from the search terms, whether those
19 had been deduped from within that set itself, and
20 whether those hits had been deduped against the prior
21 production that we already have, because that will
22 play a very large part into the review time, if the
23 documents have already been reviewed by defendants,
24 and in some cases might be already in our possession.

25 So, in short, we have several questions,

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1 and we have, I guess, the status report that was
2 filed. And we would hope, one, to get a response to
3 the email that I sent on Friday with some additional
4 detailed production, and perhaps an ability to limit
5 the amount of documents that we received to those
6 that are specifically Bates numbered, addressed in
7 series, and also be able to make a decision by the
8 end of the week on whether we'd like to request an
9 extension from the Court.

10 THE COURT: So what would you, as an action
11 item for me, or me setting up any sort of schedule,
12 what would you like for me to do, or what would you
13 like to have occur before we leave here today?

14 MS. WEINER: We'd like an answer to the
15 email from the Friday at 9:00 a.m. -- I'm sorry, I
16 actually sent the email Thursday at 5:14 Central.
17 And we would like a response to that email that
18 identifies specific Bates-numbered documents, and
19 request a series of those specific documents,
20 because, Judge, what might happen here is we might
21 not be interested in extending the schedule, but
22 there might be certain subsets of documents that can
23 be produced in a fashion that we believe is timely
24 and accessible.

25 So I'm trying to determine by Friday if

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1 there is some potential hybrid approach that allows
2 us to obtain the additional pricing information
3 without extending the schedule as proposed by
4 defendants.

5 The second item would be for -- we will
6 make a decision by Friday regarding any potential
7 requests for an extension. And we'd like
8 understandings -- to leave with an understanding that
9 defense counsel will stipulate to either some short
10 extension --

11 This takes a lot of time, Your Honor, to
12 confer with our technical people, determine what it
13 is that defendants are stating that they'll produce,
14 and how long we believe is reasonable. And as it
15 stands right now, the expert reports are due on
16 Monday.

17 So there may be some short extension that
18 plaintiffs might request in lieu of some later date
19 for production of all this information if we decide
20 to forego that opportunity.

21 THE COURT: All right. Thank you, Ms.
22 Weiner.

23 Mr. Monde, what's your thoughts, reaction
24 to Ms. Weiner's comments?

25 MR. MONDE: First of all, thanks for

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1 hearing us today.

2 Second, today is the deadline for providing
3 the time estimates, and based on the number of
4 documents hit, using the agreed upon search terms.
5 And we thought we could do that in one week and we
6 got in just under the wire, because we did not count
7 on the huge snowstorm that clobbered North Carolina.

8 And I'd be remiss if I didn't just express
9 to the Court that a lot of folks had to go above and
10 beyond to get this done. And we're glad that we were
11 able to get it done.

12 Based on the -- I mean, we've laid out in
13 detail how we went about doing the search, how we
14 identified the email custodians, and the share points
15 that we would search. I'm not hearing Ms. Weiner
16 express dissatisfaction with that. But I'm not
17 clear.

18 The Friday email that she refers to, in our
19 view, seeks to expand significantly what the Court
20 directed the parties to do. And frankly, it's as if
21 the hearing on November 28th never occurred, as if
22 the Court had never ruled that their discovery is
23 untimely. These additional requests that they're
24 making are simply discovery requests that Your Honor
25 found were untimely and fall outside of the two RFPS

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1 that relate to pricing.

2 One additional one that she wants to talk
3 about relates to focus groups, not in any way limited
4 to pricing terms. And the other has to do with costs
5 to produce. So just far afield.

6 But I'm, frankly, more than a bit surprised
7 to hear Ms. Weiner suggest that the parties at this
8 point engage in more predictive coding. And that was
9 a key element of her Friday email. What they're
10 proposing that we do is more predictive coding, using
11 generalized categories for documents. Judge, that is
12 so far afield from what we agreed on and what the
13 Court directed, number 1.

14 Number 2, given the past history in this
15 case, it's a bit ironic that the plaintiffs would now
16 be suggesting that. And, as a practical matter, were
17 we to do that, we would first have to get our
18 technical people together to meet and confer on a
19 predictive coding protocol. And that takes more time
20 than is required to agree on some Boolean search
21 terms. And then you have to run samples and seed
22 sets. What the plaintiffs are suggesting is -- just
23 runs counter to everything that they say they want to
24 do, which is to speed things along.

25 The Court observed on November 28 that, at

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1 least aspects of plaintiffs' requests were
2 schizophrenic. This is that.

3 In terms of the specific documents that
4 they requested, well, it turns out that they had been
5 given those. And we pointed it out to them,
6 including by giving them the Bates numbers. Then, as
7 to specific titles that they wanted us to run that
8 was in addition to what we agreed to on November 28,
9 but we went ahead and we did it, because it was
10 finite and something that we knew we could do without
11 delaying the process, and it turns out there were
12 four documents that they'll get as part of this
13 process assuming that they choose to go forward. So
14 we've met them and beyond in terms of what was agreed
15 to. The disagreements that exist, as I understand
16 it, are simply attempts to go beyond what was
17 ordered, and to act as if their prior discovery was,
18 in fact, timely after all, which it's not.

19 The issue that needs to be resolved, of
20 course, is the choice that the Court gave, which was
21 clear enough on its face. They can either extend the
22 schedule to allow for a production of documents. We
23 have outlined in detail why it will take us the time
24 that it will take us. I don't hear a lot of
25 complaint about that.

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1 I can tell you this, Judge, I pushed hard
2 on our folks, pushed hard on them to give me good
3 faith estimates in terms of the throughput that each
4 reviewer could do. I pushed hard to get a week's
5 worth of work done during the holidays. We've
6 squeezed out the slack in this process, and we've
7 laid out what it will be. I guess, the duration of
8 that extension to get the documents is in the eye of
9 the beholder, in terms of how you would characterize
10 it. But if you view it in the context of this case,
11 it is modest indeed.

12 So again, we're talking about what is, in
13 effect, a three-month extension. And as the Court
14 put it to the plaintiffs the other day, the choice is
15 theirs. They can either elect to receive those
16 additional documents, if they feel that they are
17 important enough for class certification to warrant
18 that extension. Or, having seen the time projection,
19 they can elect not to accept those documents and to
20 designate their experts now.

21 Of course, we will grant whatever minor
22 extension that they need for December 17, if they
23 need that. Each side has always been willing to do
24 that. Nothing is going to change there. If they
25 want another week or two, if they elect not to get

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1 the documents, if they want to put it past the
2 holidays, that's fine with us. Of course, we will
3 agree with that.

4 But what can't happen is to have the
5 plaintiffs now extend their requests beyond the
6 search terms that we worked so hard to work out with
7 them. That's not acceptable. That's not part of
8 what the Court ordered. And that will almost
9 certainly extend the extension required beyond the
10 time that we've outlined in our report.

11 THE COURT: Well, let me ask you a couple
12 of questions before I go back to Ms. Weiner. It
13 would seem to me -- and Ms. Weiner may object to
14 this -- it seems to me -- I'm sorry?

15 MR. MONDE: That was not me, Judge, it was
16 somebody else on the line.

17 THE COURT: All right. It would seem to me
18 that the plaintiffs are making their decision, and
19 the decision is to delay. They may be not yet ready
20 to say how far they're wanting to delay, and how much
21 material they want. But it looks to me, here on a
22 Tuesday (sic) afternoon past 4:00, they are basically
23 in delay mode rather than meeting that deadline on
24 Monday.

25 If that is the case, if I'm reading the

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1 question correctly and accurately, I guess the
2 question is: Why do you, or do you care? I mean, if
3 they are --

4 MR. MONDE: Not at all, Judge.

5 THE COURT: Well, let me finish my thought
6 just a second. If they are going into a partial
7 delay, full delay, whatever we call it, then to a
8 certain extent I've given them the right to get the
9 discovery that I think they need for this class
10 certification. If they're going into it, the fact
11 that you may have to sit down with them and help them
12 create search terms, and do it efficiently, and them
13 maybe give us certain searches and pick up other
14 searches, tell me whether you care, if you know that
15 it's going into delay mode or extension mode, and if
16 so, why do you care?

17 MR. MONDE: Well, if they were to -- it
18 depends on what they're seeking to do, Judge. And I
19 hear multiple possible alternatives. So let me
20 address each of them, as I hear them as possible
21 alternatives. If they want to discuss narrowing the
22 12 agreed upon search terms, and then asking us to
23 manually review the documents that are hit with that
24 reduced list, we are fine with that. We will need
25 to, of course, run a new search to determine how many

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1 documents are hit. And then, using the throughput,
2 that is the rate at which reviewers can review
3 documents based on that, we can get an updated
4 projection for when we can complete production. So
5 if that's the scenario, fine. If the scenario is
6 they want to add yet more search terms to the list,
7 then, provided that they are limited to the issue of
8 pricing, we don't object.

9 Once again, we'll have to meet and confer
10 about that. We'll have to get the terms translated
11 into the correct Boolean language, and then we'll
12 have to go through the process I just described of
13 running new searches, getting a new total on document
14 hits, and then giving the Court and the plaintiffs an
15 updated projection of how long it will take us to
16 review those and produce them. If they're asking us
17 to do -- but if that's what they want to do, provided
18 it's limited to additional terms for pricing, okay.

19 If they want to have us do predictive
20 coding related to pricing, if the Court directs us to
21 sit down with them and do that, we'll do that. I
22 think that I would just want to be on record as
23 saying that that almost certainly will result in a
24 longer delay, a materially longer delay, than what we
25 have presently projected based upon these 12 agreed

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1 upon search terms. I would be happy to be proven
2 wrong. But experience teaches otherwise.

3 And then, finally, if their scenario is to
4 start asking for new categories of documents outside
5 of pricing, we object, because all that is is
6 attempting to revisit the ruling that the Court made
7 that their written discovery requests are untimely.
8 And it just undermines the letter and spirit of what
9 we covered and what the Court ruled upon on November
10 28. If that's helpful.

11 THE COURT: Well, the last response
12 somewhat confuses me, because if we go down the path
13 of any of this additional discovery, we're basically
14 engaging in some discovery related to what discovery
15 is that I've labeled as untimely. And it's untimely
16 because we had a discovery deadline, and it was not
17 served, in my view, before -- in a way that could be
18 answered before the deadline. But it seems to me
19 that we're -- once we say: Okay, the Court is
20 willing to extend the deadline, if the plaintiffs
21 think this discovery is more important than the
22 current schedule, then in some ways we are answering
23 that untimely discovery. And so whether I do it as
24 1, 2 or 3, or I do it as just 4, or some combination
25 of those four options, we're basically answering

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1 untimely discovery, but we're making it timely
2 because we're extending the deadline.

3 Am I reading something wrong here?

4 MR. MONDE: Well, no, you're not. But I
5 would make this point: The discovery is untimely.
6 In the course of making their arguments, the
7 plaintiffs made it clear that of all the things
8 encompassed within the untimely discovery, the thing
9 they needed for class certification, the thing that
10 was potentially worth an extension, a sliding of the
11 schedule, was the pricing documents. They said that.
12 And after they said it several times, I offered that,
13 in order to move this case forward, in order to
14 address the concerns that were raised, and
15 notwithstanding the fact that it was untimely, we
16 would be willing to agree upon search terms related
17 to the pricing issue. Because that's a relatively
18 discrete, finite task.

19 That was not meant to start us down a
20 slippery slope. And if the plaintiffs on November 28
21 had said: "Well, we want the pricing material, but
22 we also want cost data, we want focus group data, we
23 want this and that, we actually want everything that
24 we asked for in all the discovery requests that are
25 late," my response would have been different, and

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1 obviously so, and we would have said, "It's simply
2 too late." There is no good reason for the
3 plaintiffs to be permitted to pursue this belated
4 discovery. And the plaintiffs have made no genuine
5 attempts to say what part of that discovery is truly
6 necessary to their class certification efforts.

7 And so that is the distinction. And what
8 this additional discovery that the plaintiffs are now
9 seeking beyond the pricing related search terms is
10 going beyond the pricing.

11 THE COURT: All right. I'm about to turn
12 back to Ms. Weiner.

13 Anything else, Mr. Monde?

14 MR. MONDE: No, sir.

15 THE COURT: All right. Ms. Weiner, Mr.
16 Monde may disagree with what I'm about to say, but
17 I'll let him correct me, but it seems to me that
18 you're still in control. You control a great deal of
19 what is going to occur. If you have made a strategic
20 professional decision that these documents are
21 something you really need to have for your class
22 certification, I'm probably going to get them into
23 your hands. But I'm also going to slide the
24 schedule.

25 And it seems to me we're probably at a

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1 point where we're going to slide the schedule anyway.
2 It just doesn't seem that, come the 17th, unless
3 you're prepared to say on the 17th, here's our
4 experts, we're moving, and forget that discovery, if
5 you're prepared to do that Friday or Monday, or
6 something like that, then I think you're in control.
7 But I think anything else, realistically, we're going
8 to have to start sliding the schedule. But, you
9 know, it seems to me that I have signaled that I'm
10 willing to work with the plaintiffs. And I don't
11 want to prejudice the defendants with an overly tight
12 schedule, something that I think could have been
13 avoided. So I'm not enthusiastic about putting my
14 thumb on the defendants. But I'll keep the pedal a
15 little bit to the metal to keep this thing moving.
16 But you're in control.

17 My suggestion would be: I simply say take
18 the time you need to make a professional tactical
19 strategic decision. Don't worry about Monday's
20 deadline. If it slides, it slides. I'm expecting it
21 to slide. We have Mr. Monde's representation that he
22 doesn't care too much about that schedule on Monday.
23 And so we'll let it slide and take his word for it
24 that we'll work out a new schedule, and you take the
25 time you need to make this decision.

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1 And that's what I would propose. And I can
2 set another scheduling conference. I have slightly
3 given yours away this afternoon in a three-defendant
4 restitution -- I am literally running out of -- the
5 last time I talked to you, I was running out of days.
6 Now I'm running out of hours. So I've given your
7 4:00 on Wednesday away to a three-defendant
8 restitution case that's got a 90-day deadline. I
9 think it's the 90th day, so I'm literally at 3:30
10 that afternoon. I might be able to squeeze something
11 in on Thursday. I think that was the note I was
12 going to write to myself. Ms. Bevel can be looking
13 at that. And we can get back together maybe on
14 Thursday. I don't know what I have on Thursday of
15 next week, or Friday, Thursday or Friday.

16 What's your reaction to what I'm saying?
17 We'll see, if after you speak, whether Mr. Monde has
18 a lot of problem with the way I'm reading the
19 situation.

20 MS. WEINER: I'm trying to limit my
21 comments to that which I think will advance the ball
22 here. Because Mr. Monde said a lot which I don't
23 agree with in his remarks a couple of moments ago.
24 Most notably that anything that we've done is in
25 conflict with what we believe was an agreement

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1 between the parties, which will be borne out in the
2 motion that we will ultimately file with the Court
3 detailing the -- probably at least half a dozen
4 letters going back and forth on the timing to
5 produce this information, not whether or not this
6 information was going to be produced.

7 So if there is any delay here, it is our
8 strong contention that it is not because of the
9 plaintiffs' delay, and that we were attempting to
10 work with defense counsel on getting this information
11 produced in a respectful and timely manner. So the
12 fact that we found ourselves here being accused of
13 delaying and not serving discovery is very
14 frustrating, and simply contrary to the discussions
15 between the parties.

16 So I will limit my remaining comments to
17 where we are, and the email from Friday, which I
18 believe is important to the overall decision that we
19 will make -- we hope to make by Friday, Your Honor.

20 But Your Honor is correct, we do need to
21 take some time to digest the report filed by
22 defendants today, which from first glance, and
23 discussing with our expert, is about three times
24 longer than we believe it should take to produce
25 those documents. So whether we are just not going to

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1 have a meeting of the minds on that point, and we
2 just have to make a decision, that's probably the
3 case.

4 But what we did, and what I want to explain
5 to Your Honor, all of the efforts that have been made
6 here to obtain the documents that are responsive to
7 the pricing requests that are at issue here -- and we
8 don't agree with Mr. Monde that documents reflecting
9 the cost to produce the American Spirit cigarette is
10 anything unrelated to pricing. Of course that
11 relates to pricing. The cost to manufacture them is
12 what goes directly related to the pricing. So that
13 is one of the requests and has always been at issue
14 in the four that were sent by Mr. Schultz to Mr.
15 Monde back in the beginning of November.

16 So what we did is we spent a significant
17 amount of time last week going through the documents
18 we already have. For example, a document titled,
19 "RJRT Outlet Pricing Tool." We reviewed this
20 document. There is one of them, and we believe that
21 there are probably additional like documents. Mr.
22 Monde stated that that title in their -- as they went
23 back to look for that title, that it was simply to
24 them, in addition to the search term list that we had
25 already provided.

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1 So what I did was I went back and found a
2 specific document where that RJRT Outlet Pricing Tool
3 was located, and asked that a search was run to
4 identify if that document exists as a series of
5 documents. We did the same exact thing. We
6 identified how many hits and how many were duplicates
7 with specific Bates-numbered documents that relate
8 directly to pricing.

9 And so, Your Honor is correct, in our
10 decision professionally whether to extend the
11 schedule, we are trying to figure out if these
12 documents that I have identified by Bates number, we
13 believe were missing the universe of those documents,
14 which should have already been produced, but we do
15 not believe have been produced. If they can go back
16 and answer the email with those specific Bates
17 numbers, and specific requests for information, like
18 "Average retail prices for the sub-brand across the
19 class period," in our opinion that should have
20 already been produced, but if it hasn't, it should be
21 fairly easy to locate, which might allow us, if there
22 is an extension here, to have that extension be very,
23 very brief. Because we do not want to extend the
24 schedule out into the spring.

25 So we will be providing the Court with a

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1 full understanding of the picture of the information
2 that should have been -- all of it -- should have
3 been produced to the plaintiffs long before the end
4 of November conference. But at a minimum, we would
5 like a response to the email that I sent on Friday
6 with specific Bates numbers requesting the universe
7 of documents related to those Bates numbers so that
8 we can make a decision regarding if, and for how
9 long, we'd like to request an extension.

10 Because it may well be that we have a
11 conversation about limiting the search terms, and
12 perhaps -- and honestly, Your Honor, we really don't
13 know. I'm not trying to hide the ball here. We, you
14 know, quickly tried to review the status report, get
15 on the phone this afternoon with our technical folks,
16 try to understand what that extension might look
17 like, what limiting particular search terms might
18 look like. We have not had any discussion with
19 defense counsel since we received the report. So at
20 a minimum, a couple of days to meet and confer on our
21 side, and perhaps ask a couple of questions, like I
22 have this afternoon regarding deduplication, I think
23 at a minimum we should get a response to that email I
24 sent on Friday which only narrows the field of
25 documents, not expands it. And I'm happy to provide

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1 that email for the Court as well.

2 So we would like a response with respect to
3 the specific Bates numbers. And, Your Honor, the
4 reason why we even raised this issue of analytics, or
5 predictive coding, if you will, is because, again --
6 and I did this before the hearing today -- so that we
7 could understand there might be tools that we can
8 utilize to take documents, such as the documents that
9 I have identified Bates number, and run analytics
10 with those documents against this set of documents
11 that has been identified by defendant to make this
12 process faster. And I haven't received a response as
13 to whether -- and frankly, I am, Your Honor, not the
14 one who the response needs to go to. I'd have to get
15 my technical people back involved. But it was in
16 consultation with our experts that we sent that
17 email. And I think it's extremely relevant to the
18 timing and potentially getting an extension here.

19 So that's the first place. We'd like to
20 get an answer to that email with those specific
21 documents, detailing what efforts have or could be
22 made to round out those series of documents that we
23 believe are missing from the production.

24 And we would like -- and Mr. Schlesinger
25 and Mr. Haberman are on the phone right now -- we'd

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1 like at least a couple of days to digest this and
2 determine -- you know, it's a delicate balance, Your
3 Honor, as I'm sure you can appreciate, the need --
4 what we could say is, quote, "the need for
5 documents." You know, we could move forward with
6 experts. We've had our experts retained for a very
7 significant period of time.

8 It's just a matter of obtaining the
9 information that we believe is out there. It's not
10 that we can't move forward with experts. We believe
11 that there might be an even more significant
12 prejudice in allowing the schedule to linger into the
13 spring. So we're trying to weigh those pros and cons
14 here.

15 THE COURT: Let me ask Mr. Monde two
16 questions, and then I'll come back to you, Ms.
17 Weiner. Mr. Monde, I don't have a copy of this
18 email. That may or may not be important, but let me
19 ask you two questions: One, do you intend to respond
20 to the email? And second, do you have a timeframe --
21 if you do intend to respond, when do you think you
22 would respond by?

23 MR. MONDE: Judge, first of all, yes, we
24 can respond to that email. The reason we have not
25 responded to date is because it asked us to engage in

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1 predictive coding.

2 When we got that email on Friday, with a
3 snowstorm bearing down on North Carolina, we faced a
4 decision. We could either continue talking with
5 plaintiffs, who move the goalposts every time we talk
6 with them, and we're trying to claw back what was
7 foreclosed on November 28, or we could do what the
8 Court directed us to do, which is to run those search
9 terms, find out the number of hits, and then run the
10 calculations necessary to determine how long it would
11 take us to process those documents. That work is now
12 done.

13 And if the plaintiffs want to talk about
14 predictive coding, which is the essence of that
15 Friday email, then, yes, we will engage with them.
16 And we can do it by making a specific response to the
17 email, or if they choose to, we can get people on the
18 phone who can talk about predictive coding. But
19 again, I just -- it's just a little hard to
20 understand why it is that the plaintiffs would want
21 to do that.

22 Second, the -- I hope I've answered your
23 question.

24 THE COURT: Well, the first question is --
25 I think you are going to respond to the email. The

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1 second is: When will you get a response to them?

2 MR. MONDE: I can't answer that right now,
3 Judge, because I would need -- the technical folks,
4 the people who do predictive coding will have to be
5 involved. I can't speak for them right now. And I
6 already once put them under the gun. I can represent
7 to the Court and assure the plaintiffs that we will
8 do it with all deliberate speed. And I will start on
9 that tomorrow morning. But I cannot now commit to a
10 date certain, because it is outside of my control.

11 MS. WEINER: Your Honor, can I respond just
12 briefly on this predictive coding issue?

13 THE COURT: Let me think for just a second,
14 then I'll hear from you, Ms. Weiner.

15 MS. WEINER: Okay. Thank you.

16 THE COURT: Let me ask you a question, Ms.
17 Weiner, and then you can tell me what you want on
18 predictive coding.

19 But to make meaningful another conversation
20 with me about where we're going, if I gave you 30
21 minutes on Thursday at 9:00, or one hour on Friday
22 afternoon at 3:00 p.m. -- I can give you either one
23 of those or both, if that would be helpful, by when
24 would you need a response from Mr. Monde to make
25 those -- one or both of those hour and a half with me

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1 productive?

2 MR. MONDE: Judge, may I please interject?

3 As I explained to the Court when we were together on
4 November 28, I am going to be out of the country with
5 my family starting on Thursday the 20th in the
6 morning.

7 THE COURT: What time in the morning?

8 MR. MONDE: Our flight leaves at 11:10
9 a.m. Eastern time. We are traveling internationally,
10 and so I need to leave the house at 8:00 a.m.

11 MS. WEINER: And, Judge, I'm in court in
12 San Jose on the morning of the 20th, and on an
13 airplane as well, unfortunately.

14 THE COURT: What do you have on Wednesday?
15 I'm not going to be stationary on Wednesday, but I
16 could probably do -- call in the car coming back from
17 Las Cruces. Is everybody available on, say,
18 Wednesday afternoon, if I were to try to do one from
19 the car?

20 MR. MONDE: Yes, sir.

21 MS. WEINER: Yes, Your Honor.

22 THE COURT: And we might have to tape it,
23 because my court reporter is going to go down there
24 with me. And she's very talented, but I haven't seen
25 her drive and take transcription at the same time.

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1 And I'm not sure I'm interested in seeing that. So
2 we'll probably tape it, and you can get it
3 transcribed. If you have not done that service
4 before, it's really quite good, so it's no problem.

5 All right. So let me refresh myself, when
6 is that last sentencing in Las Cruces?

7 THE CLERK: The last one is scheduled at
8 9:30. I would imagine half an hour.

9 THE COURT: We're laughing. Last time they
10 didn't bring the defendant. But details, details,
11 right?

12 Well, why don't I do this? What if I set
13 it for 11:00 New Mexico time? That will be past your
14 lunch hour on the east coast, and that way it will be
15 the first thing in the afternoon, and it will be
16 before my lunch hour. That doesn't do you any good,
17 does it, Ms. Weiner?

18 MS. WEINER: No, Your Honor. I'm traveling
19 that morning to Los Angeles. My firm -- I am
20 available in the afternoon Pacific time, but I will
21 be on the airplane in the morning. So I could do
22 2:00 or 3:00 Pacific. So is that one hour --

23 THE COURT: Let's see, the problem I've got
24 is I just gave away everything after 3:30 on
25 Wednesday because of this criminal case. So that's

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1 going to be 4:30 on Pacific time. What time do you
2 land in California, Ms. Weiner?

3 MS. WEINER: I'm pulling up my flight
4 information right now. I could do anything after
5 around the noon hour. I could be in transit, in a
6 taxi as well, Your Honor, which is fine. I just want
7 to give a little bit of space. I land around 11:00
8 Pacific time.

9 THE COURT: Okay. So that's 12:00 here.
10 Do you want to make it 12:30 or 1:00? What's --

11 MS. WEINER: Let's do 1:00, just so I have
12 a little bit of a buffer to get off the plane.

13 THE COURT: All right. So 1:00 New Mexico
14 time. Everybody just call in to this number here. I
15 may be the one that's most inept at calling in, now
16 that we've changed our telephone system. But let's
17 shoot for 1:00. And that will give us a little bit
18 of time.

19 Now go back to my question, Ms. Weiner. To
20 make that conversation on Wednesday afternoon as
21 meaningful as possible, when do you need a response
22 from Mr. Monde?

23 MS. WEINER: Your Honor, given that I sent
24 that email on -- I think it was Thursday last week --
25 by close of business on Friday would be the absolute

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1 latest. Because I'm going to be traveling starting
2 on Wednesday morning. And that would only still give
3 us two business days to get in touch with our folks
4 and consider the information and get any sort of
5 decision made.

6 THE COURT: Could you live with a response
7 deadline, Mr. Monde, of the end of business on
8 Friday? You may not be able to say everything, but
9 give some response. And if you have to do some
10 rolling response the following week, so be it, but
11 try to give some response, as much as possible, by
12 the end of business on Friday?

13 MS. WEINER: Judge, we will do the best we
14 can. But I am in no way committing to a full
15 response by Friday.

16 And I guess counsel didn't hear me when
17 I -- the notion that we've been sitting on this, I
18 object to. It is contrary to the facts. And the
19 primary person that will be involved in helping us
20 respond to this email is in Washington, D.C. out of
21 town on business, and I believe tied up all day
22 tomorrow. We'll do the best we can, Judge, but I
23 simply can't commit to more right now.

24 And, again, it's just objectionable to
25 suggest that we've been sitting on this.

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1 THE COURT: All right. Well, let's do
2 this: I want some response to the email by the end
3 of business on Friday. And then, B, make it as
4 robust as possible. And then we'll go from there.
5 If we have to do some rolling responses next week,
6 we'll just have to do it. We'll see where we are at
7 1:00 New Mexico time on Wednesday. I'll be calling
8 in. I'll be in the state, so I'll still have a
9 commission that allows me to conduct business. So
10 I'll be calling in at 1:00. So people don't need to
11 be here. If they want to be here, that's fine, but
12 otherwise we'll expect to be on the phone at 1:00.

13 MR. MONDE: Excuse me for interrupting.

14 I've got to say I'm extraordinarily
15 frustrated. The Court was very clear to us in terms
16 of the direction it gave, in terms of the report that
17 we needed to provide. The Court itself called it
18 robust. And that's because we invested a great deal
19 of effort and time in preparing it. And I feel that
20 we just wasted our time doing that now. Because the
21 goalposts have been moved.

22 At page 35 of the transcript -- and where
23 we're headed, Judge, is when you say to Ms. Weiner:
24 Take the time to make a professional decision, the
25 schedule is going to slide, but I want to give you

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1 the time you need to get these documents in your
2 hands, that phrase "these documents" is going to
3 morph. It's going to morph far beyond pricing
4 documents. And that's what's going to happen. And
5 that's what we are sliding down the slope on.

6 At page 35 of the transcript from November
7 28th, the Court said "But call it a protective order,
8 or whatever, the defendants do not have to respond to
9 the discovery that was served shortly before the
10 deadline. It's untimely. Now, I will extend the
11 time to get those documents in your hands, the
12 pricing documents."

13 And then later on you said, on that page,
14 "I'll give you the choice, Ms. Weiner. You can live
15 with what's right now, where I'm not requiring the
16 defendants to produce, or I can extend the deadlines,
17 start working with you to put new deadlines in place
18 then, to get the pricing documents in your hands.
19 Which do you prefer?"

20 And what is now happening is we're
21 expanding that to mean other things, to broaden the
22 searches. And that's -- but beyond the delay
23 involved, there is expense involved, and it's expense
24 that we shouldn't be bearing. And that's my view,
25 respectfully.

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1 And yes, we will do what the Court has
2 directed. We will make every effort to respond as
3 much as possible by the close of business Friday to
4 Ms. Weiner's Friday email. But I'd be remiss if I
5 did not share those concerns with the Court.

6 MS. WEINER: Might I respond?

7 THE COURT: Well, I still think -- well,
8 hold on. Let me respond, and then I'll let you
9 respond. But I guess, first of all, you still don't
10 have to respond to discovery. I mean, so my
11 protective order, or order, is still in place.
12 You're not having to respond to discovery. We are
13 trying to make a decision whether we're going to go
14 back into discovery mode of either a limited nature,
15 or more robust or full-blown nature.

16 And I would agree with the defendant, the
17 more this morphs, chances are the longer the
18 continuance. And that's the reality. And I think
19 the plaintiffs have to deal with that reality that
20 the more it morphs, the longer the continuance gets.

21 It's a little difficult for me to figure
22 out exactly what's going to be argued in the class
23 certification motion. I mean, I have some good
24 knowledge from the motion to dismiss, and I can make
25 some educated and experienced guesses and estimates.

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1 But still, you know, it's the plaintiffs' case, and
2 they're going to have to tell us how this thing gets
3 certified, and what it would look like if it were
4 certified. And so I'm going to have to give them a
5 little bit of latitude here to make that call.

6 They've got to balance how quickly they want to get
7 to a class certification hearing and motion, and how
8 much they need in discovery. I don't think that's a
9 whole lot different than what I do all the time when
10 I'm trying to balance schedules with plaintiffs'
11 needs for discovery.

12 So I hear what you're saying and, you know,
13 the more it morphs, the more they want, chances are
14 the longer the continuance is going to be, but
15 anyway...

16 Ms. Weiner.

17 MS. WEINER: Your Honor, I wish that I
18 could have recorded the meet and confers between
19 counsel and play them back for the Court, where we
20 were welcomed to provide specific Bates numbers and
21 documents to try to not expand or morph or move the
22 goalposts. Nothing has been moved here.

23 This all relates specifically to pricing.
24 And all we are trying to do is identify the documents
25 to the extent we can that can be produced more

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1 expeditiously than what defendants have proposed.
2 And I would like to just read to the Court the
3 documents that Mr. Monde is claiming moved the
4 goalposts or somehow morphed this. Because it will
5 be very clear to the Court that that is not what is
6 happening here. All we have requested in that email
7 that I keep referring to is a document called the
8 "RJRT Outlet Pricing Tool." And that is specifically
9 related to pricing.

10 The next one is called "Natural American
11 Spirit Price Strategy Discussion." And I told Mr.
12 Monde we obtained 29 hits, but those are duplicates
13 for only three months: August, September, and
14 November of 2010. Please produce the entire set.
15 And then I attached an example of that document,
16 which is a price strategy discussion. All we asked
17 for was that document, or an answer that it doesn't
18 exist across the class period.

19 The next one is a "Price Gap workbook,"
20 which I also attached. It's referenced in emails
21 with a link to the workbook, but we couldn't access
22 the link. And I identified the Bates number. And
23 it's all a Santa Fe pricing report. And we've even
24 located, but we think it resides on something called
25 the "SFnPC Bridge," which is also true of another

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1 document called the "Santa Fe Price Gap Guide." All
2 we asked was for them to use, you know, predictive
3 coding. Your Honor, we can use that term really
4 loosely. And I have one of my lawyer tech folks on
5 the phone, Mr. Teppler. But predictive coding is
6 widely used in litigation, in ESI. In fact, there
7 are plenty of court decisions that you are allowed to
8 use predictive coding.

9 The issue that we've had in this case is
10 that defendants used predictive coding in error, and
11 it resulted in a large error that we've been trying
12 to meet and confer over and resolve.

13 But the notion that using certain
14 analytical tools to take documents that we've already
15 identified, and locate other documents just like it
16 in a database, that that is somehow obscene or
17 outside of the regular course of conducting
18 electronically stored information review, is just
19 plain wrong.

20 So all I inquired was, if they were using
21 analytics to try to identify these documents, and if
22 so, what analytics were being used? So this notion
23 that my entire email was about analytics, I simply
24 would ask for information regarding the review that
25 would be conducted to try to utilize specific tools

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1 commonly used in ESI to limit the amount of time to
2 review documents in a larger production.

3 The next document is called "Price
4 Management." I identified it by specific Bates
5 number. And we could only find drafts of three of
6 the reports, for Q3 in 2011; Q1 and 2 in 2012. I
7 asked for them to determine if they exist in a
8 series, where we would get the full class period
9 worth of that document.

10 The next one is called "SFNPC Price Gap
11 Guide." We talked about that a little earlier. I
12 attached a PDF of a PowerPoint discussing that guide.
13 Then I asked for a "Gap SFNPC Dashboard Output
14 Detail," which I said I believe is on the Santa Fe
15 Bridge. The pricing guide for this document, in
16 addition to search the email and home drives, we
17 asked that they run the analytics, or something, to
18 locate this document, which I identified by Bates
19 number for the entire class period.

20 And the last one was a "Pricing Overview."
21 And I asked the same, if they could identify that
22 document in a series. And the reason, Your Honor,
23 why I asked about analytics, is because when you take
24 titles of documents, sometimes, depending on how the
25 meta data in the document is held, it might not come

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1 up as the, quote, "title," as we would refer to it in
2 common speak. But rather, if you take a document,
3 you can run analytics against it to determine or find
4 documents that look like it, but are different, or in
5 that same series.

6 We then asked for RJRT documents regarding
7 premium cigarette brands broken down by year and
8 month; RJRT documents with revenue and costs of
9 premium cigarettes by year and month and state.
10 These are all requests that are specifically related
11 to pricing. The last thing we asked for in that
12 email was material described by one of defendant's
13 employees, Karen Calderon. In her deposition, Ms.
14 Calderon -- and Mr. Monde knows exactly what this
15 deposition testimony is -- that -- she stated that
16 they can identify the price gap between Marlboro and
17 American Spirit cigarettes even down to the week by
18 state geographically. So we asked for that. If
19 you've got it, produce it.

20 So these are -- what we've asked for -- and
21 the updated search terms, Your Honor, are all related
22 to pricing, they all have the word "price" in them,
23 which is one of the search terms originally
24 identified in this case.

25 So we are not moving -- if anything, we're

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1 trying to narrow the field to these pricing documents
2 that we believe -- and Your Honor will see when we
3 ultimately move to compel -- it was agreed to be
4 produced; it's responsive to the RFPS. And all we've
5 done here is tried to make this easier by identifying
6 specific Bates numbers of documents that we believe
7 should be produced.

8 So a response by Friday will give us the
9 opportunity to determine what they're willing, and
10 can produce, and what should be, Your Honor, based on
11 all of the technical consultation that we've had in
12 this, and our own experience in ESI, and frankly how
13 long it took our side to review the documents that
14 we've received -- much shorter to produce the
15 information that I sought in the email from last week
16 than what defendants have represented in that status
17 report that they filed today.

18 So that is -- I am not going to sit and,
19 you know, be accused of moving the goalposts, when
20 all we've asked for is the pricing information that
21 we believe should be more readily identifiable now
22 that we've given specific documents that they can run
23 and locate.

24 THE COURT: Well, let me react a little bit
25 to that. I'm not saying that -- I'm not making any

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1 ruling here. And I'm not also saying that if you
2 don't want to go into this area you're not, A,
3 entitled to it, or I won't let you do it. But when I
4 talk about morphing, when I hear the word "cost," I
5 think that's beginning to morph. Because I think we
6 were talking on November 28th about pricing. And now
7 I'm hearing the word -- not as much, but some --
8 cost. And so I will probably consider that to be
9 morphing.

10 Now, I do understand, from taking economics
11 and being alive for this many years, that cost
12 affects price. But I also can imagine that a lot of
13 pricing could have less to do with cost.

14 So all I'm telling you, as you make your
15 decision whether to go forward and what to ask for, I
16 probably will begin to think of cost as morphing.
17 And I won't use the word "moving the goalposts. I
18 like "morphing" better. But it's probably beginning
19 to expand more than what I envisioned and what I was
20 thinking of when I thought we were going into
21 pricing. I think it's beginning to go into some
22 broader areas.

23 So if that's helpful to you in making the
24 decision that you have to make, just be aware that
25 I'll probably, in my mind, start seeing that as

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1 morphing. And as I indicated earlier, the more
2 morphing, the more continuance and extension that
3 will take place.

4 All right. Is there anything else we need
5 to discuss while we're together? Anything else I can
6 do for you? Ms. Weiner?

7 MS. WEINER: Nothing further, Your Honor.
8 Should we assume that we will discuss what will now
9 be the expert deadline next week, and that we should
10 not plan to produce reports on Monday? I just want
11 to be really clear about that.

12 THE COURT: That's fine with me. Does that
13 work for you, Mr. Monde?

14 MR. MONDE: Yes.

15 THE COURT: All right. Anything else, Ms.
16 Weiner?

17 MS. WEINER: Nothing further, Your Honor.

18 THE COURT: How about you, Mr. Monde? Is
19 there anything else we need to discuss today?
20 Anything else I can do for you?

21 MR. MONDE: As much as I would like to
22 respond to Ms. Weiner, Judge, I don't think that a
23 real purpose is served doing that this afternoon.

24 Thank you for your time. And nothing
25 further.

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1 THE COURT: All right. I will be on the
2 phone with somebody at 1:00 next Wednesday. And
3 we'll hope the connections go well and that I don't
4 get cut off somewhere between Las Cruces and
5 Albuquerque. Be patient with me, because there are
6 some dead spots out there. I've got a pretty good
7 phone, the court gives me a pretty good phone. But
8 we may be on and off a little bit as I try to get
9 back.

10 All right. Y'all have a good evening.
11 Talk to you next week.

12 (The Court was in recess.)

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4 DISTRICT OF NEW MEXICO
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6
7 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
8 Official Court Reporter for the State of New Mexico,
9 do hereby certify that the foregoing pages constitute
10 a true transcript of proceedings had before the said
11 Court, held in the District of New Mexico, in the
12 matter therein stated.

13 In testimony whereof, I have hereunto set my
14 hand on December 15, 2018.

15
16
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